SJC-13242

COMMONWEALTH vs. CHRISTIAN EDWARDS.

Hampden. September 7, 2022. - December 7, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Abuse Prevention. Protective Order. Practice, Criminal, Discovery, Disclosure of evidence, Dismissal, Mistrial, Double jeopardy.

Complaint received and sworn to in the Springfield Division of the District Court Department on March 26, 2019.

An order of dismissal was entered by Patrick S. Sabbs, J., and a motion for reconsideration was heard by him.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

David L. Sheppard-Brick, Assistant District Attorney, for the Commonwealth.

Joseph N. Schneiderman for the defendant.

The following submitted briefs for amici curiae:

Andrea Harrington, District Attorney, & Patrick Sadlon, Assistant District Attorney, for district attorney for the Berkshire district.

Anne Rousseve, Committee for Public Counsel Services, Chauncey B. Wood, Jessica J. Lewis, William C. Newman, & Matthew R. Segal for Committee for Public Counsel Services & others.

Deborah J. Manus for Boston Bar Association.

GAZIANO, J. During his trial for violation of an abuse prevention order, see G. L. c. 209A, § 7, the defendant objected when the Commonwealth attempted to introduce in evidence a certificate of service of the order that had not been disclosed in discovery. The Commonwealth previously had disclosed a different certificate of service, for a modification of the order; service of that modification was after the date of the alleged violation. After a sidebar hearing to discuss the defendant's objection, the judge determined that it would be "fundamentally unfair" to the defendant to continue with the trial, or to allow the Commonwealth to retry the defendant, and sua sponte dismissed the case with prejudice. The defendant did not object to the judge's ruling. The Commonwealth's motion for reconsideration was denied. The Commonwealth then appealed from the dismissal and from the denial of its motion for reconsideration to the Appeals Court, and we transferred the case to this court on our own motion.

We conclude that the dismissal with prejudice was an abuse of discretion because there was no egregious prosecutorial misconduct, and the judge could have remedied the discovery violation in some other way, such as by issuing a continuance or excluding introduction of the certificate. As the dismissal was issued for procedural reasons, and not as a finding on the

ultimate question of the defendant's guilt, it was functionally equivalent to a declaration of mistrial. We therefore analyze whether double jeopardy principles bar a retrial of the defendant under our jurisprudence on mistrials.

We further conclude that the defendant did not consent to a mistrial because, first, the lack of objection to the dismissal did not constitute implied consent, and second, prior to the judge's ruling, counsel expressed a preference for the case to be resolved by the empanelled jury. Because there was no manifest necessity to declare a mistrial, the Commonwealth is barred from retrying the defendant.[1]

1. Background. On June 11, 2018, an abuse prevention order issued against the defendant pursuant to G. L. c. 209A, § 7 (209A order). The order prohibited the defendant from contacting his former girlfriend, and it required him to stay at least fifty yards away from her and to leave and stay away from her residence. According to a police report, on February 22, 2019, at about 7:40 P.M., as the former girlfriend was getting out of her vehicle to enter her house, her brother, who lived

[1] We acknowledge the amicus brief submitted by the district attorney for the Berkshire district; the amicus brief submitted by the Committee for Public Counsel Services, American Civil Liberties Union of Massachusetts, Inc., and Massachusetts Association of Criminal Defense Lawyers in support of the defendant; and the amicus letter submitted by the Boston Bar Association.

with her, told her that he had just seen the defendant's mother's Black Nissan sedan pass by the house. The former girlfriend then drove to a friend's house for safety, at which point her brother called her and told her that the defendant's car kept circling the house.

The police report indicated that the defendant had been served with a 209A order on August 8, 2018, and that the order had an expiration date of July 12, 2019. In March 2019, a complaint issued against the defendant charging him with one count of violating an abuse prevention order. See G. L. c. 209A, § 7. A certificate of service indicates that the defendant was served with a modification of the order on April 22, 2019.

On January 8, 2020, at a pretrial conference on the complaint, a different assistant district attorney stood in for the attorney who later represented the Commonwealth at trial. The trial judge asked the prosecutor, "[F]or your exhibits, it's the restraining order?" She responded, "Yes, your honor." The judge then asked defense counsel whether he had been provided the order, to which defense counsel responded, "Yes." When the judge inquired whether there were "any problems with service," defense counsel responded that he had "been provided discovery."

On the first day of trial, the prosecutor informed the judge that she would not be calling any police officers as

witnesses. On the second day of trial, the victim, the defendant's former girlfriend, began to testify. When the prosecutor attempted to show her a copy of the certificate of service for the 209A order, the defendant objected. At sidebar, defense counsel said that he had never seen the document the Commonwealth was attempting to introduce. He explained that the order provided to the defendant during discovery indicated a date of service of April 22, 2019, after the date of the alleged violation, February 22, 2019, while the order that the prosecutor was attempting to introduce indicated a date of service of August 8, 2018, prior to the date of the alleged violation. Counsel argued that it would be a violation of the rules of discovery for the Commonwealth to introduce the earlier 209A order. He noted that, at the pretrial conference, the prosecutor had asked him whether she had given him the Commonwealth's discovery, and counsel had shown the prosecutor what he had received so that she could compare it to her own files. The prosecutor had confirmed that counsel had received what she believed to be the proper documents.

After hearing this explanation, the judge pointed out that, if counsel had believed that service had been made after the alleged violation, then he could have filed a motion to dismiss. Counsel responded, "And then they could have re-complained it and my client would be back in the position he finds himself in

today. That's why I wanted to [e]mpanel the jury, so that he could be found not guilty of this offense." The judge replied, "I'm not sure about [re-complaining]. If that were the actual date of service, then they would not have been able to [re-complain] it." Counsel noted that the police report indicated a date of service prior to the alleged violation, and added, "I could not have filed a [DiBennadetto] motion to dismiss because the application for complaint said that he was served prior to the incident."[2]

The prosecutor argued that the Commonwealth should not be precluded from introducing the certificate of service, because defense counsel was on notice of the August 8, 2018 service from the date indicated in the police report, he had had the opportunity to raise the issue of service at the trial-readiness conference, and he could have obtained a copy of the 209A order from the clerk's office. Counsel responded,

> "the position of the [prosecutor] and the court cannot be that it is my job to help the government prove the case against [the defendant]. The government gave me the evidence that they intended to use at trial, and I set it up for the trial based on the evidence that they gave me and my assessment of the strengths of the case. . . . I can't be expected to, and I won't, help the government prove their case against [the defendant], [or] point out fatal flaws in their cases for them so that they can prove their cases."

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[2] See Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002) ("a motion to dismiss . . . is the appropriate and only way to challenge a finding of probable cause" in District Court).

The judge asked the prosecutor whether she had a copy of what had been provided to the defendant during discovery. The prosecutor responded that she "was not the original [assistant district attorney (ADA)] that gave that copy. . . . The copy was given back on June 18th of 2019 by another ADA, not myself."

Following the sidebar discussion, the judge called a recess; immediately after the recess, the judge ruled on the defendant's objection. The judge stated that he would not "fault the defense attorney for not trying to seek a certified copy" of the 209A order mentioned in the police report prior to trial. In addition, the judge observed that, "there were multiple prosecutors in the life of this case. However, this assistant district attorney in front of me is the one who is, at this point, on the hook for this."

The judge said that he had considered all of the options, including declaring a mistrial. The judge declined to declare a mistrial because it "would allow the Commonwealth to . . . get a new trial date." At the subsequent trial, the Commonwealth would be able to introduce the previously undisclosed certificate of service, after having certified prior to this trial that discovery was complete. The judge explained,

> "The Commonwealth is really bound by their trial readiness and [their certification] that all the discovery was complete. It was, now, apparently incomplete, and incomplete as to a fundamental theory of proof for the

> Commonwealth. . . . [A]ll I can say is that the other prosecutors need to communicate with each other."

The judge also decided that, even if the earlier certificate of service were to be excluded at a subsequent trial, "it would be unfair to the defendant to go forward" with the trial, because the Commonwealth might then have a police officer testify as to the earlier date of service, which would be "fundamentally unfair" to the defendant. Accordingly, the judge concluded that "the sanction [is] that the matter will be dismissed with prejudice."

The prosecutor moved to reconsider. In her motion, she stated that she was unable to confirm that the Commonwealth had provided the defendant with the correct certificate of service during pretrial discovery. At a hearing on the motion, the prosecutor reiterated that defense counsel willfully had concealed from the judge his belief that the Commonwealth had disclosed an order that had been served after the date of the alleged violation. The prosecutor argued that "the defendant was not surprised by the evidence because he knew he had not received it."

Defense counsel argued that it was not his "burden to assume the Commonwealth's theory of the case. . . . The Commonwealth gave me discovery. It's not the defendant's obligation . . . to alert . . . the Commonwealth . . . to

misconduct or errors or oversights on the part of the Commonwealth that are to the defendant's advantage." The judge expressed reservations about characterizing the Commonwealth's actions as "misconduct." Defense counsel asserted that while the judge might not be comfortable labeling what had happened "misconduct," the defendant had "no obligation to help the Commonwealth prove the case or to make sure that the Commonwealth provides discovery sufficient to convict the defendant. . . . [G]iven the discovery that I received, . . . I exploited [the missing order] to the best of my ability. Now the Commonwealth is essentially arguing that, you know, they should get a do-over because of that."

The judge noted that the defendant might have been "on notice for what a police officer might have testified to because it's in a police report," but that "the Commonwealth decided not to call the [police as] witnesses prior to any of this happening." The judge pointed to "the Commonwealth's obligation at the trial readiness to make sure that, however many prosecutors had their hands on the file, that all of the discovery that they intend to use has been provided to the defendant." The judge also said that he would not fault the defendant for "waiting in the weeds" to object to the introduction of the 209A order at trial. Finally, the judge emphasized that the dismissal was his decision, and not a

request by the defendant, and reaffirmed the dismissal with prejudice.

The Commonwealth appealed to the Appeals Court from the dismissal and from the denial of its motion for reconsideration, and we transferred the case to this court on our own motion.

2. Discussion. The Commonwealth argues that the dismissal with prejudice was an abuse of the judge's discretion to sanction discovery violations. The defendant maintains that the dismissal with prejudice was justified because the Commonwealth committed an avoidable discovery violation that effectively deprived him of a viable defense.

The Commonwealth also argues that it is not barred from retrying the defendant because, by not objecting to the judge's order of dismissal, he consented to a mistrial, and that the defendant "exploit[ed] the [Commonwealth's] discovery failure to obtain a dismissal or a not guilty verdict." The defendant contends that a retrial is barred because he did not consent to the termination of the trial and there were sufficient grounds for prohibiting a retrial.

a. Discovery violation. As stated, the judge dismissed the case with prejudice as a sanction for the Commonwealth's attempt to introduce a certificate of service for a 209A order that had not been disclosed in discovery. The Commonwealth argues that this constituted an abuse of discretion in part

because the defendant was not prejudiced by the Commonwealth's discovery violation. "We review the judge's sanctions order for abuse of discretion or other error of law." Commonwealth v. Sanford, 460 Mass. 441, 445 (2011), quoting Commonwealth v. Carney, 458 Mass. 418, 425 (2010).

As part of its mandatory discovery obligations, the Commonwealth must disclose all intended exhibits to the defendant at or before the pretrial conference. See Commonwealth v. Taylor, 469 Mass. 516, 521-522 (2014); Mass. R. Crim. P. 14 (a) (1), as amended, 444 Mass. 1501 (2005). This is intended to ensure that a defendant can "make effective use of the evidence in preparing and presenting his case." Commonwealth v. Stote, 433 Mass. 19, 23 (2000), quoting Commonwealth v. Wilson, 381 Mass. 90, 114 (1980).

When a party violates its discovery obligations, the trial judge may issue a sanction. Mass. R. Crim. P. 14 (c), as appearing in 442 Mass. 1518 (2004). Sanctions for discovery violations are "a mechanism for protecting a defendant's right to a fair trial" by ensuring that the Commonwealth complies with its discovery obligations. See Commonwealth v. Frith, 458 Mass. 434, 439 (2010). "Sanctions for noncompliance with discovery are within the judge's discretion" (citation omitted). Id. at 440. In sanctioning a discovery violation, "the court may make a further order for discovery, grant a continuance, or enter

such other order as it deems just under the circumstances." Mass. R. Crim. P. 14 (c) (1). The court also may "in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to [rule 14]." Mass. R. Crim. P. 14 (c) (2).

To convict a defendant of violating a 209A order, the Commonwealth must prove that the defendant was aware of the terms of the order before the time of the alleged violation. Commonwealth v. Shea, 467 Mass. 788, 794 (2014). Here, the judge found that the Commonwealth did not provide in discovery a certificate of service indicating that the defendant had been served with a 209A order before the date of the alleged violation. Accordingly, introduction at trial of the undisclosed certificate would have undermined the defendant's planned defense that the Commonwealth had failed to establish all the elements of the offense. See Commonwealth v. Lowery, 487 Mass. 851, 869-870 (2021); Cruz v. Commonwealth, 461 Mass. 664, 671-672 (2012).

The Commonwealth argues that the defendant was not prejudiced by the discovery violation because "defense counsel was aware of the discovery problem and the actual date of service," and thus the defendant did not face any "unfair surprise" when the prosecutor attempted to introduce the previously undisclosed certificate of service at trial. The

modern rules of discovery, however, "were created to permit defense counsel to learn, through discovery of the government's evidence, what the defendant faces in standing trial, and to assist in preventing trial by ambush." Commonwealth v. Eneh, 76 Mass. App. Ct. 672, 677 (2010). The Commonwealth certified, pursuant to Mass. R. Crim. P. 14 (a) (3), that it had disclosed all of its intended exhibits prior to trial, and it was proper for defense counsel to rely on the Commonwealth's certification. See Commonwealth v. Gilbert, 377 Mass. 887, 895 (1979) (question is whether "the defense [was] materially hurt in its preparation by having to meet unexpected [evidence]"). It thus was not an abuse of discretion for the judge to sanction the Commonwealth for its discovery violation.

Having concluded that imposition of a sanction against the Commonwealth was appropriate, we turn to the nature of the sanction imposed.

b. Dismissal with prejudice. Two principles govern a judge's imposition of sanctions for a discovery violation. "First, sanctions are remedial in nature. Second, sanctions should be tailored appropriately to cure any prejudice resulting from a party's noncompliance and to ensure a fair trial." Sanford, 460 Mass. at 445-446, quoting Carney, 458 Mass. at 427.

Under these principles, dismissal with prejudice can be a permissible response to a discovery violation by the

Commonwealth. See Commonwealth v. Washington W., 462 Mass. 204, 215 (2012); Mass. R. Crim. P. 14 (c) (1). Nonetheless, dismissal with prejudice is a "remedy of last resort because it precludes a public trial and terminates criminal proceedings." Washington W., supra, quoting Commonwealth v. Mason, 453 Mass. 873, 877 (2009). A dismissal with prejudice is warranted "where there is egregious prosecutorial or police misconduct and prejudice to the defendant's right to a fair trial, and where the dismissal is necessary to cure the prejudice." Washington W., supra. "Such relief should be reserved" only for "the most intolerable government conduct." Commonwealth v. Wood, 469 Mass. 266, 291 (2014), quoting Commonwealth v. Monteagudo, 427 Mass. 484, 485 n.1 (1998). In determining whether to dismiss with prejudice, a judge should consider the prejudice the defendant would endure in the "subsequent trial and the interference with procedural rights therein." Mason, supra, quoting Commonwealth v. Viverito, 422 Mass. 228, 231 (1996).

The Commonwealth argues that the decision to dismiss with prejudice here was an abuse of discretion. We agree. While the Commonwealth was at the very least negligent in failing to provide, during the more than one year of discovery, the sole exhibit it planned to rely upon at trial, its actions did not reach the high threshold of egregious misconduct. See Brangan v. Commonwealth, 478 Mass. 361, 366 (2017) ("The standard for

prosecutorial misconduct mandating the dismissal of an indictment is high"). Nothing in the judge's findings, or in the record, suggests that the Commonwealth's error was intentional. See id. at 367 (dismissal of indictment was inappropriate in part because prosecutor did not knowingly make false statement to jury); Cruz, 461 Mass. at 673-674 ("Dismissal was considered and rejected because the prosecutor's violation of the discovery order was found to be unintentional"). Rather, the judge expressed reservation in characterizing the Commonwealth's actions as "misconduct," and suggested instead that the error could be attributed to a failure of the various assistant district attorneys who had prosecuted the case to communicate with each other. See Commonwealth v. Brusgulis, 398 Mass. 325, 333 (1986) (reversing dismissal with prejudice in part because there was no prosecutorial misconduct).

Moreover, the judge had available alternative remedies to cure the discovery violation. See Mason, 453 Mass. at 877 (dismissal of criminal case "is a remedy of last resort" [citation omitted]). A continuance, for instance, could have provided the defendant with additional time to prepare a response to the newly disclosed certificate of service. See Mass. R. Crim. P. 14 (c) (1) ("For failure to comply with any discovery order . . . the court may . . . grant a continuance"). See also Commonwealth v. Kostka, 489 Mass. 399, 412 (2022),

quoting Commonwealth v. Baldwin, 385 Mass. 165, 177 (1982) ("defense counsel should, when faced with delayed disclosure situations, seek additional time for investigative purposes"). The judge also could have ordered the certificate of service excluded from introduction at trial. See Commonwealth v. Cole, 473 Mass. 317, 331 (2015), overruled on other grounds by Commonwealth v. Wardsworth, 482 Mass. 454 (2019) ("When a party fails to comply with its discovery obligations, Mass. R. Crim. P. 14 (c) (2) . . . confers on a judge the discretion to exclude evidence based on the party's noncompliance . . .").

While the judge considered this latter remedy as a possibility, ultimately he rejected it as unfair because the Commonwealth thereafter could have substituted a police officer's testimony about the date that the order had been served. The defendant's right to be notified of the Commonwealth's witnesses, however, would have been protected had the judge instead precluded any police testimony as to this point. See Lowery, 487 Mass. at 869 (judge may "exclude evidence from a witness whose name was not disclosed during discovery"); Commonwealth v. Nolin, 448 Mass. 207, 224 (2007), quoting Stote, 433 Mass. at 23 (in determining whether to suppress undisclosed testimony, "we ask whether the prosecution's disclosure was sufficiently timely to allow the defendant 'to make effective use of the evidence in preparing

and presenting his [or her] case'"). The suppression of such testimony, along with the exclusion of the earlier 209A order, would have protected the defendant from any unfair surprise at trial. See Commonwealth v. Reynolds, 429 Mass. 388, 398 (1999) ("prevention of surprise" is one factor "taken into account in reviewing the exclusion of an undisclosed witness"); Commonwealth v. Daly, 90 Mass. App. Ct. 48, 52 (2016) (in precluding late-disclosed evidence, judge must consider "prevention of unfair surprise").

In addition, the discovery violation did not present the sort of irremediable harm that should preclude a retrial. See Commonwealth v. Lam Hue To, 391 Mass. 301, 314 (1984) ("Such a drastic remedy would be appropriate where failure to comply with discovery procedures results in irremediable harm to a defendant that prevents the possibility of a fair trial"). The defendant argues, to the contrary, that the dismissal with prejudice was justified because the introduction of the certificate of service disrupted his planned defense, which was to assert that there was no evidence that he knew an abuse prevention order was in effect at the time of the alleged violation. With proper notice before retrial, however, the certificate of service would not have been unexpected, and the defendant would have been aware that a defense based on its absence would be unavailing. See Nolin, 448 Mass. at 224, quoting Stote, 433 Mass. at 23 ("it is

the consequences of the delay [in disclosure] that matter, not the likely impact of the nondisclosed evidence"); Gilbert, 377 Mass. at 895 (question is whether "the defense [was] materially hurt in its preparation by having to meet unexpected [evidence]").

The situation here is not unlike the circumstances in Commonwealth v. Blaikie, 375 Mass. 601, 606-607 (1978), where a trial judge granted the defendant's request for a mistrial because testimony by a police officer referred to incriminating statements by the defendant that had not been included in pretrial discovery. Prior to retrial, the prosecutor provided the defendant with the incriminating statements that previously had been undisclosed. Id. At his new trial, the defendant was convicted; he argued on appeal that "because the prosecutor at the aborted first trial allegedly breached a pretrial discovery agreement to disclose all the defendant's statements, due process requires that the prosecution be limited at the second trial to only those statements disclosed prior to the first trial." Id. at 607. We concluded that "[t]he award of a new trial, accompanied with pretrial disclosure of all the defendant's statements, remedied the effect of the prejudicial testimony at the first trial." Id. Accordingly, the preclusion of a retrial here was unnecessary. See Commonwealth v. Light, 394 Mass. 112, 114 (1985) ("In some instances, charges should be

dismissed because of prosecutorial misconduct. In others, . . . a defendant is entitled only to be protected from the prosecutor's misconduct by having a new trial . . .").

Having determined that the dismissal with prejudice was an abuse of discretion, we turn to consider whether the protection against double jeopardy precludes retrial of the defendant. To address this argument, we first must discuss in some detail the manner in which the trial was terminated.

c. Order of termination. The decision to allow a retrial "implicates a defendant's right, under the Fifth Amendment to the United States Constitution, as well as Massachusetts statutory and common-law protections, against being placed in jeopardy twice for the same criminal offense." Commonwealth v. Bryan, 476 Mass. 351, 356 (2017). A dismissal with prejudice, when issued in error, however, does not necessarily preclude retrial. See Brusgulis, 398 Mass. at 333. Rather, the "manner in which the proceeding ended" determines whether a retrial would violate the protection against double jeopardy. See Commonwealth v. Taylor, 486 Mass. 469, 481-482 (2020), citing Lee v. United States, 432 U.S. 23, 30 (1977).

"Under double jeopardy principles, there are two overarching categories of orders by which a judge can terminate a trial prior to a verdict by the fact finder: acquittals and procedural dismissals, often referred to as mistrials." Taylor,

486 Mass. at 481. "An acquittal occurs where there is a ruling on the facts and merits, . . . [including any] ruling which relates to the ultimate question of guilt or innocence" (quotations, citations, and alterations omitted). Id. Double jeopardy precludes retrial when a defendant is acquitted. Id. By contrast, retrial may be permissible after a mistrial if a defendant consented to the mistrial, id. at 483, or if there was a manifest necessity to declare the mistrial, Bryan, 476 Mass. at 356.

Here, both the Commonwealth and the defendant agree that the judge's order dismissing the case in effect resulted in a mistrial, and that jeopardy attached. The judge did not make a finding on the ultimate question of the defendant's guilt but, rather, dismissed the complaint because a retrial would be "fundamentally unfair." See Taylor, 486 Mass. at 481 ("termination of the proceedings . . . on a basis unrelated to factual guilt or innocence of the offense" does not constitute acquittal [citation omitted]). "We thus analyze whether double jeopardy bars the current prosecution under our jurisprudence concerning mistrials" (citations omitted). Id. at 482.

d. Double jeopardy. "We review determinations regarding double jeopardy de novo." Taylor, 486 Mass. at 477. Because jeopardy attached at trial, the Commonwealth is precluded from

retrying the defendant unless he consented to the mistrial or there was a manifest necessity for a mistrial.

i. Whether defendant consented to mistrial. The Commonwealth argues that the defendant consented to the mistrial, and thus may be retried. The defendant argues that there was no consent because defense counsel at trial expressed a preference against the case being dismissed, and consent was not implied by counsel's lack of objection to the dismissal.

A defendant may consent explicitly to a mistrial either by moving for one or by agreeing "to one proposed by the prosecutor or judge." Taylor, 486 Mass. at 483. Consent to a mistrial also may be implied "where a defendant had the opportunity to object [to a declaration of a mistrial] and failed to do so." Pellegrine v. Commonwealth, 446 Mass. 1004, 1005 (2006), quoting Commonwealth v. Phetsaya, 40 Mass. App. Ct. 293, 298 (1996). See United States v. McIntosh, 380 F.3d 548, 554 (1st Cir. 2004) ("Where the defendant sits silently by and does not object to the declaration of a mistrial even though he has a fair opportunity to do so, a court may presume his consent" [quotation and citation omitted]); United States v. Goldstein, 479 F.2d 1061, 1067 (2d Cir. 1973) ("Consent [to a mistrial] need not be express, but may be implied from the totality of the circumstances attendant on a declaration of a mistrial.").

The Commonwealth argues that the defendant consented to the declaration of a mistrial because he did not object when the judge ordered the case dismissed. As the Commonwealth asserts, the defendant did not formally object to the judge's order of dismissal. An objection, however, may be raised in ways other than an "expressly articulated opposition to a mistrial." Taylor, 486 Mass. at 483. In particular, a defendant may object by expressing a preference against mistrial prior to the judge's ruling. In Commonwealth v. Cassidy, 410 Mass. 174, 177 n.2 (1991), for instance, a mistrial was granted over the defendant's objection, even though the defendant "did not formally object to the mistrial," because the defendant had "ask[ed] the judge to try to avoid a mistrial." A defendant need not express his or her aversion to a mistrial immediately prior to the judge's declaration. In Commonwealth v. Donovan, 8 Mass. App. Ct. 313, 316-317 (1979), the Appeals Court affirmed the trial judge's finding that the defendant did not consent to a mistrial because, at a hearing prior to the declaration of a mistrial, defense counsel "requested that the trial go forward," and suggested ways in which a mistrial could be avoided.

Here, at the sidebar discussion that preceded the judge's order, defense counsel explained that he had not filed a motion to dismiss before trial because he "wanted to [e]mpanel the jury, so that [the defendant] could be found not guilty of this

offense." The defendant also did not seek, at any point, to have the case dismissed. The defendant thus gave notice that his preferred course was for the case to be heard and decided by the empanelled jury. See Taylor, 486 Mass. at 483, quoting United States v. Scott, 437 U.S. 82, 93-94 (1978) ("The important consideration, for purposes of the [d]ouble [j]eopardy [c]lause, is that the defendant retain primary control over the course to be followed . . .").

Turning to whether the defendant impliedly consented to a mistrial, the defendant argues that, where a trial judge sua sponte orders a dismissal with prejudice, a reviewing court should not infer consent from a lack of explicit objection. He contends that a defendant should not be required to object in order to preclude a mistrial.

The United States Supreme Court has held that, where a defendant's motion to dismiss an indictment on procedural grounds is allowed, the defendant may be retried. Scott, 437 U.S. at 98-99. In such circumstances, the defendant has "deliberately [chosen] to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence" and so "suffers no injury cognizable under the [d]ouble [j]eopardy [c]lause" if the defendant is retried. Id. The Court in Scott, however, left open the question whether a defendant may be retried where the dismissal is ordered sua

sponte by the judge, and the defendant has not objected. Across jurisdictions, there is "conflicting authority" on this question. State v. Bruno, 293 Conn. 127, 142 n.13 (2009). In United States v. Dahlstrum, 655 F.2d 971, 975 (9th Cir. 1981), cert. denied, 455 U.S. 928 (1982), the United States Court of Appeals for the Ninth Circuit held that a dismissal with prejudice precludes retrial where the trial judge "was the instigator" of the dismissal, and the defendant had "no control" over the course of events leading up to the dismissal. There, a Federal District Court judge had dismissed an indictment for tax evasion after finding that the Internal Revenue Service had "abused its power." Id. at 972-973. During the testimony that led to the judge's decision to dismiss, the majority of the questioning was performed by the judge. Id. at 973. The judge did not consult with the defendant as to what course of action to take, and the defendant did nothing to suggest that he was "seeking to avoid a decision by the trier of fact." Id. at 975. Similarly, the North Carolina Court of Appeals has concluded that the protections against double jeopardy prevented a retrial where "the trial judge, sua sponte, instigated the dismissal" without input from the defendant. State v. Vestal, 131 N.C. App. 756, 760 (1998).

By contrast, the Ohio Supreme Court has held that "no interest protected by the [d]ouble [j]eopardy [c]lause precludes

a retrial" where the sua sponte dismissal of an indictment is issued in error. See State v. Calhoun, 18 Ohio St. 3d 373, 377, cert. denied, 474 U.S. 983 (1985). The court held that "[t]he purpose of the [d]ouble [j]eopardy [c]lause is to preserve for the defendant acquittals or favorable factual determinations but not to shield from appellate review erroneous legal conclusions not predicated on any factual determinations." Id.

Here, as stated, the defendant did not argue for, or request, that the judge dismiss the case, with or without prejudice. Rather, the judge issued his ruling, without input from the parties, after defense counsel had urged the exclusion of the earlier certificate of service from introduction in evidence. See Dahlstrum, 655 F.2d at 975-976. Contrast Scott, 437 U.S. at 98-99, and United States v. Kennings, 861 F.2d 381, 383, 385 (3d Cir. 1988) (defendant "explicitly consented to the court's sua sponte motion to dismiss" because he argued for dismissal in open court). We therefore must decide whether, when a judge "instigates" a dismissal, the defendant must object in order to avoid a later determination that he consented to a mistrial.

We conclude that a defendant has no such obligation. When a trial ends in a dismissal, there is no declaration of a mistrial to which a defendant can object. See Taylor, 486 Mass. at 484 (no opportunity to object where there was no declaration

of mistrial). "[W]here a defendant did not have an opportunity to object to [a mistrial], the defendant is not deemed to have consented." Id. at 483. If anything, by not objecting to the dismissal with prejudice, the defendant impliedly consented to a dismissal that bars retrial. See Mason, 453 Mass. at 877 (dismissal of criminal case precludes public trial and terminates criminal proceedings). Contrast Pellegrine, 446 Mass. at 1005. Because a dismissal with prejudice is ordered with the very purpose of precluding a retrial, we cannot infer the defendant's consent to a retrial from his silence. See United States v. You, 382 F.3d 958, 964-965 (9th Cir. 2004), cert. denied, 543 U.S. 1076 (2005) ("a court may infer consent only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order" [quotation and citation omitted]).

Similarly, we previously have concluded that consent to a mistrial cannot be inferred from a defendant's motion for a required finding of not guilty. See Taylor, 486 Mass. at 471. In Taylor, supra at 482, even though the defendant's motion for a required finding was successful, we determined that "the termination of the trial was procedural," and thus the ruling "played the functional role of a declaration of a mistrial." We also concluded that the defendant did not consent to be retried, because his motion was for a ruling that would bar a future

prosecution, and we had no way to determine whether the defendant would have objected had the judge declared a mistrial. Id. at 483-484. Here, too, we "can never know" whether the defendant would have objected had the judge expressly declared a mistrial. See id. at 484.

The Commonwealth contends that the defendant evinced his acquiescence to a mistrial where he "exploit[ed] the [Commonwealth's] discovery failure to obtain a dismissal or a not guilty verdict." This argument is unavailing. "[A] defendant who merely sets in motion a series of events that leads to the termination of his or her trial is protected from being retried by the [d]ouble [j]eopardy [c]lause." United States v. Pharis, 298 F.3d 228, 244 (3d Cir. 2002). The defendant was under no obligation to disclose at the pretrial conference that the certificate of service he received through discovery was insufficient to support a conviction. If, at the pretrial conference, the defendant had revealed his intention to exploit the deficiency of the Commonwealth's evidence, his trial strategy would have been unveiled to the prosecution. Generally, "a defendant need not reveal his defense." Commonwealth v. Edgerly, 372 Mass. 337, 342 (1977).[3]

[3] There are a few exceptions to this general rule, none of which are applicable here; pursuant to Mass. R. Crim. P. 14 (b), as appearing in 442 Mass. 1518 (2004), "the prosecution is

In sum, the defendant made a statement in favor of continuing with the empanelled jury and did not have an opportunity to object to what was effectively a declaration of a mistrial. The defendant thus did not consent to be retried. The Commonwealth therefore may reprosecute the defendant only if there was a manifest necessity for a mistrial. See Taylor, 486 Mass. at 484.

ii. Manifest necessity. We review a determination regarding manifest necessity for an abuse of discretion. Taylor, 486 Mass. at 484. In determining whether to declare a mistrial, a judge must weigh the "defendant's valued right to have his or her trial completed by a particular tribunal" against "the interest of the public in fair trials designed to end in just judgments" (quotations, citations, and alteration omitted). Taylor, supra. "Two principles guide our review: (1) counsel must have been given full opportunity to be heard and (2) the trial judge must have given careful consideration to alternatives to a mistrial" (alterations omitted). Id., quoting Ray v. Commonwealth, 463 Mass. 1, 4 (2012).

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entitled to notice, and in some cases discovery, when the defendant intends to defend on the basis of alibi, lack of criminal responsibility, or the existence of a license, claim of authority or ownership, or exemption." Reporter's Notes (Revised, 2004) to Rule 14, Massachusetts Rules of Court, Rules of Criminal Procedure, at 167 (Thomson Reuters 2021).

Here, there was no manifest necessity to declare a mistrial. As discussed, among other things, the trial judge could have issued a continuance or could have excluded the certificate of service and barred the Commonwealth from recanting on its earlier statement that it would not call any police witnesses. See Lowery, 487 Mass. at 869 (judge may "exclude evidence from a witness whose name was not disclosed during discovery"); Cole, 473 Mass. at 331 ("When a party fails to comply with its discovery obligations, Mass. R. Crim. P. 14 [c] [2] . . . confers on a judge the discretion to exclude evidence based on the party's noncompliance"); Nolin, 448 Mass. at 224 (consequences of prosecutor's failure to disclose witness were "mitigated [in part] by the judge's grant of delay"). While the judge considered excluding the certificate of service, he apparently did not consider precluding any police witnesses from testifying as to the date of service of the abuse prevention order. See Bryan, 476 Mass. at 358 ("the judge [must] fully explore[] possible alternatives before declaring a mistrial"). The exclusion of the certificate of service and police testimony regarding it would have bound the Commonwealth to the sole document it provided in discovery and would not have divested the defendant of his right to complete the trial before his chosen tribunal. Contrast id. at 360 ("After weighing

possible alternatives to a mistrial, the judge concluded that nothing else would suffice").

Undoubtedly, the defendant benefited from the inadvertent mistakes by the prosecutor. We nonetheless are constrained by the protections against double jeopardy from ordering a new trial. See Commonwealth v. Gonzalez, 437 Mass. 276, 283 (2002), cert. denied, 538 U.S. 962 (2003) ("Double jeopardy principles will often foreclose any remedy for, or shield from review, a trial judge's errors or misconduct"). See also Arizona v. Washington, 434 U.S. 497, 503 (1978) ("an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation" [quotation and citation omitted]).

Order of dismissal affirmed.